IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 11TH DECEMBER 2007 / 20TH AGRAHAYANA 1929

SA.No. 700 of 1994()

AS.90/1993 of ADDL.S.C.,THALASSERY
OS.218/1991 of MUNSIFF COURT, THALASSERY
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APPELLANTS/RESPONDENTS 1 TO 3/PLAINTIFF:
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1. P.N.SAMYUKTHA, JANATHA TOURIST BOOKING, THALASSERY, SHOP NO.G.F.15/NEW BUS STAND COMPLEX, THALASSERY

2. C.P.ACHUTHAN, PALAYAD, DHARMADAM, THALASSERY

3. C.K.VIJAYAN, PUNOOL, THALASSERY

BY ADV. SRI.PARTHASARATHY
SRI.R.K.MURALEEDHARAN

RESPONDENTS/RESPONDENTS 3 AND 4/ DEFENDANTS:
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1. TELLICHERRY MUNICIPAL COUNCIL, REP. BY MUNICIPAL COMMISSIONER, THALASSERY

2. THE CHAIRMAN, THALASSERY MUNICIPALITY, THALASSERY

3. K.K.USMAN, THALASSERY AMSOM, VADIKKAKAM, DESOM.

4. C.MUKUNDAN, THIRUVANGAD AMSOM, VAYALALAM DESOM.

BY ADV. SRI.M.P.ASHOK KUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 11/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.NO. 700 OF 1994

Dated 11th December 2007

J U D G M E N T

Plaintiffs in O.S.218/1991 on the file of Munsiff court, Thalassery are the appellants. Respondents are defendants. Appellants instituted the suit seeking a decree for permanent prohibitory injunction restraining first respondent Municipality and second respondent Chairman of Municipality from passing Agenda Nos.1 and 2 shown in Ext.A3 notice in the Council meeting to be held on 17/8/1991. Suit is filed in a representative capacity after obtaining permission under Order I Rule 8 of Code of Civil Procedure. First appellant is a licensee of room No.GF 15 of Thalassery New Bus Stand Complex where she is running a tourist booking office. Case of the appellants was that varandha of the building is for the benefit of all the shop owners as well as the general public and cannot be made use of by the adjacent shop owners and license arrangement specifically prohibited the usage of the varandha by

the shop owners and in violation of the terms, the respective licensees of the rooms are using the Varandha resulting in obstruction to other licensees of the shop rooms as well as general public. Ext.A2 mass petition was submitted by the second respondent to remove the obstructions but in vain. Ext.A3 notice of the Council meeting was published with a proposal to impose rent/license for the encroached portion of the varandha. It was contended that Municipality has no right to pass such a resolution. Contending that if such a resolution is to be passed it is against the Kerala Building Rules as well as provisions of the license deed, a decree for injunction was sought restraining Municipality from considering the Agenda in the meeting to be held on 17/8/1991. Respondents 3 and 4 subsequently got themselves impleaded as additional defendants. Respondents 1 and 2 in their written statement resisted the suit contending that the extension by the licencees in the front portion of the bunks near the T.B.Shopping Complex was removed by the Municipality and on 30/11/1990 as per resolution No.1 Municipality decided that shop keepers who were using part of the varandha were to

be allowed to occupy after paying additional license fee and those who are not prepared, such encroachment are to be removed and as per resolution No.3 in the meeting held on 27/4/1989 it was decided that additional license fee is to be collected from those licensees and Agenda Nos.1 and 2 of Ext.A3 notice is only meant for that notice and before getting notice from court Municipality has decided to give the encroached area to the concerned shop owners and that decision was taken as per the Agenda decision and Municipality is competent to take the decision and therefore suit is not maintainable.

2. Learned Munsiff on the evidence of PW1, Ext.A1 to A5 and B1 and B2 granted a decree holding that varandha forms part of the street as defined under sub section 30 of Section 3 of Kerala Municipalities Act and under Section 209 of Municipalities Act no one can put up a wall or erect fence or make any encroachment on public street and since varandha abutting public streets are integral part of public street, no one can be allowed to encroach and use it for other purpose than for the purpose for which it is vested. It was held that

Municipality is not entitled to grant license to use varandha and therefore granted a decree for injunction. Respondents 1 and 2 challenged that judgment before Sub court, Thalassery in A.S.90/1993. Learned Sub Judge on re-appreciation of evidence allowed the appeal and dismissed suit holding that encroached area was permitted to be used by the licensees of the shop rooms on payment of additional rent calculating by restraining the area occupied by them and it would only beneficial to the Municipality and that right of the Municipality cannot be questioned. Appeal was allowed and suit was dismissed. That judgment is challenged in the appeal. Though appeal was admitted, no substantial question of law was formulated. Therefore, learned counsel appearing for appellants and respondents were heard.

3. Learned counsel appearing for appellants argued that though trial court rightly found that Municipality is not entitled to allow the shop owners to use the varandha which is meant for the usage of general public and neighbouring shop owners, first appellate court reversed that decision for the reason that by permitting licensees to use the varandha

Municipality will not get additional amount and it is beneficial and that finding of the first appellate court is not sustainable. Learned counsel appearing for respondents pointed out that suit is only for injunction to prevent the Municipality from taking up Agenda Nos.1 and 2, which was subsequently taken up by the Municipality and hence suit is infructuous and being a suit for injunction alone, appeal is only to be dismissed.

4. On hearing the learned counsel I do not find any substantial question of law involved in the appeal. Suit is one for permanent prohibitory injunction restraining Municipality from considering and deciding Agenda Nos.1 and 2 in the meeting of the Municipality to be convened on 17/8/1991. Though appellants in their plaint as well as in Ext.A1 memorandum submitted to the second respondent contended that general public is experiencing difficulty because of the actions of the shop owners who enclosed the respective varandha and made varandha part of the shop building and Municipality is not entitled to regularise the encroachment, they did not seek a decree either for a direction to the

Municipality to remove the encroachments or sought a mandatory injunction for getting removal of the encroachment made by respective licensees. Decree sought for was from considering agenda Nos.1 and 2 of Ext.A3 notice. Agenda No.1 relates to the question whether Municipality has to impose 25% excess license fee for the encroached portion of the varandha. Agenda No.2 was regarding the question whether those who are not prepared to pay, shall be evicted and to provide facility so given shall not be available to future occupants. By restraining the Municipality from considering Agenda No.1 or Agenda No.2, the result is that encroached portion of the varandha will not be removed. Viewed from that angle, it cannot be said that suit is instituted for the benefit of general public and that too as public interest litigation. If Agenda Nos.1 and 2 are not taken into consideration, it would only benefit the encroachers. Whatever it be, it is admitted case that subsequently Municipality had taken up the Agenda and decided to regularise the encroachment and also to collect additional license fee. If that be the case, suit is definitely infructuous. If at all, remedy of the appellants is

to seek decree for declaration. A decree for injunction restraining respondents from considering the Agenda, which has already been considered and resolution passed, is not sustainable. Appeal is therefore dismissed. Appellants are at liberty to challenge the decision taken by the Municipality in appropriate proceedings.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.700 OF 1994

11th December 2007

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